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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, A. D., 1918

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CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, AND WABASH  
RAILWAY COMPANY,

*Petitioners,*

vs.

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL, F. C. HUBBELL  
AND F. M. HUBBELL & SON,

*Respondents.*

*66*  
No. 648

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**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI.**

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F. W. LEHMANN AND  
J. L. PARRISH,

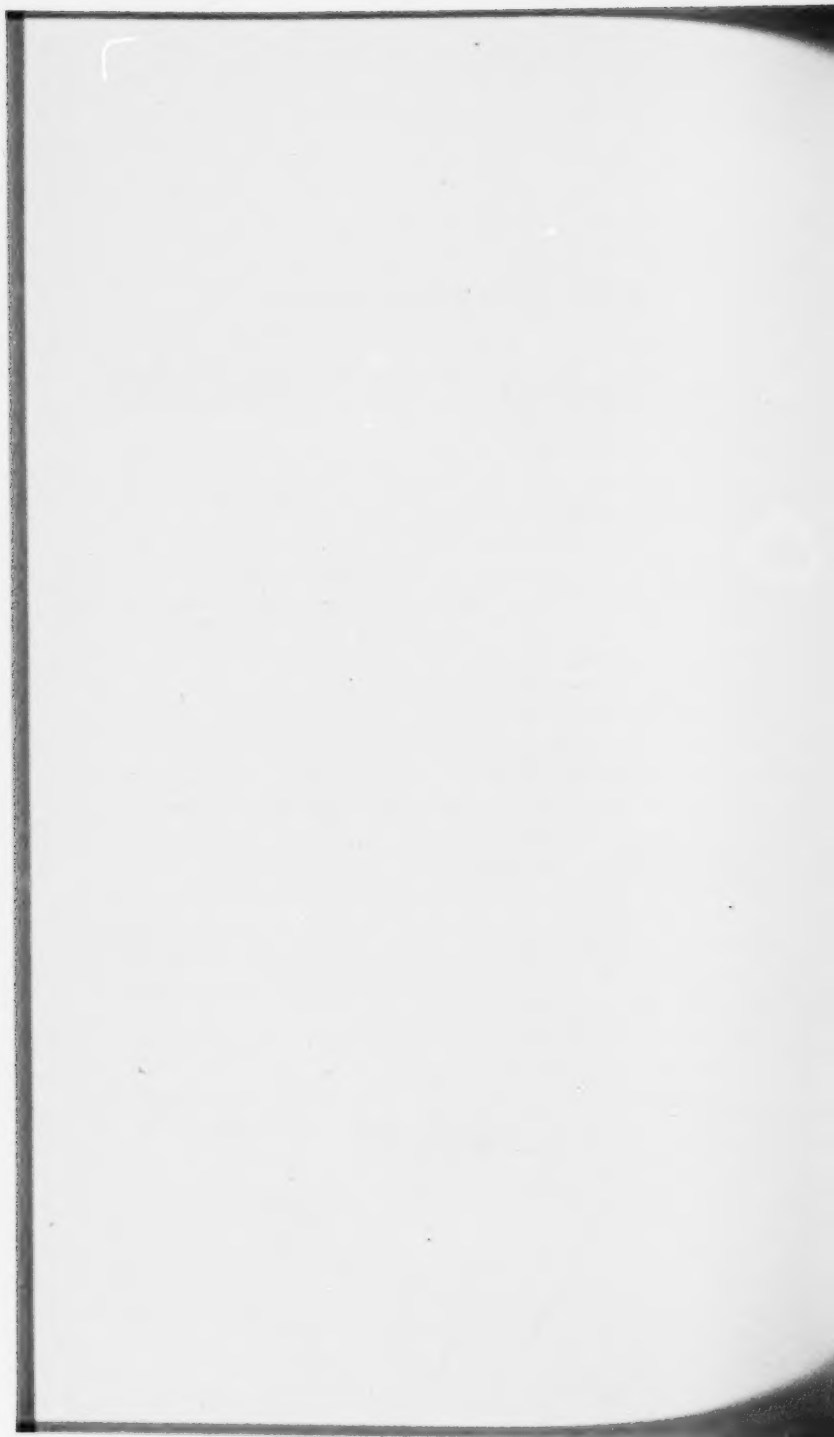
*Of Counsel or Respondents.*



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RAILWAY COMPANY,

*Petitioners,*

v.

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL, F. C. HUBBELL  
AND F. M. HUBBELL & SON,

*Respondents.*

No. 819

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

### The Parties.

The petitioners, the Chicago, Milwaukee and St. Paul Railway Company and the Wabash Railway Com-

pany, have each of them a line of railroad terminating at Des Moines, Iowa.

The respondent, the Des Moines Union Railway Company, owns and operates the railway terminal system which is used by the Milwaukee and Wabash and some other railway companies at Des Moines.

The respondents, F. M. Hubbell and F. C. Hubbell, are officers of the Des Moines Union Railway Company and have been for thirty years or more.

The respondents, F. M. Hubbell and Son are stockholders in the Des Moines Union Railway Company.

### **The Subject of Contention.**

The nucleus of the property of the Terminal Company was acquired about 1882 and prior thereto by the Milwaukee and Wabash Companies, or rather by their predecessors, also railroad companies, and owning and operating the same lines of railroad now owned and operated by the Milwaukee and Wabash.

These predecessor companies organized or caused to be organized, the Des Moines Union Railway Company, with authorized capital stock of one million dollars and with authority for the issuance of bonds.

By deeds absolute and unqualified in form, the predecessors in title of the petitioners, conveyed this terminal property to the corporation they had created and as consideration for such conveyance they took four hundred thousand dollars of the bonds of this terminal company and all of its capital stock.

Other property was later and from time to time acquired by the company and paid for by its bonds or by proceeds of the sale of bonds.

The capital stock of the Des Moines Union was taken

by the companies which created it, one-fourth to each of the two original companies which are predecessors of the Milwaukee, and one-half to the predecessor of the Wabash.

The amount of this capital stock was fixed in the first instance at one million of dollars, increased then to two million dollars, and finally left at two million as being authorized, but only four hundred thousand as having been paid for and as so adjusted and issued one-half of the stock was assigned to the Wabash predecessor and the other half to the Milwaukee predecessors.

Of this stock F. M. Hubbell and Son have acquired twenty-five hundred shares by purchase from the predecessors of the Milwaukee and the Wabash, and the stock holding in the Terminal Company now is and has been for more than twenty years as follows:

The Wabash.....	500 shares.
The Milwaukee.....	1,000 shares.
F. M. Hubbell & Son.....	2,500 shares

### **The Question in the Case**

Is as to the title by which the Terminal Company holds its property.

It got that property from the predecessors of the petitioners and they had unquestioned and unqualified good title. It got it by deeds which by their terms conveyed to the Terminal Company the same unquestioned and unqualified good title which the grantors had. And it paid full rounded measure of value therefor in its stocks and bonds.

Nonetheless, the petitioners contend that at some



time in the course of dealing between the parties, there was in some way, some sort of an easement in this property reserved to the grantors, an easement which gave to them the entire beneficial use, right and interest in the property in perpetuity, and that the Terminal Company by the deed absolute to it and for which it gave full value, got only the barren legal title.

Under this contention the Terminal Company must operate this property always for the use and behoof of the petitioning railway companies, for the bare cost of operation so far as they are concerned, with no allowance on account of the value of the property employed, and moreover, all rents, incomes, earnings and profits, the fruit of the use of the property by or for third parties, must go to these same petitioning railway companies.

The shares of stock of the Terminal Company are thus rendered entirely worthless, which the railway companies can well afford since they absorb everything as owners of the dominant estate. F. M. Hubbell & Son, however, lose everything.

### **The Decision of the Court of Appeals**

Was against this contention of the railway companies, and held that the Des Moines Union Railway Company was the owner of its property, that it had in fact gotten what it had bought and paid for, and that the predecessors of the petitioners had parted with what they had sold and received the price for. The Wabash and the Milwaukee seek by their petition a review of this decision.

### **The Beginning of the Enterprise.**

From our point of view the petition for certiorari herein is not entirely accurate in its presentation of the facts of the case, and we therefore think it appropriate to make a statement in chronological order of the acts and contracts involved, and to let these, as far as possible, speak for themselves in the very words of the record.

Three companies, predecessors of the petitioners, prior to 1882 determined on building lines of railroad to Des Moines, one of them, now the Wabash, from the south, and two of them, now the Milwaukee, from the north and northwest. They acquired land in Des Moines to be used by them for terminal purposes jointly, the purchase being made in part directly by the railroad companies and in part by James F. How and General G. M. Dodge, as trustees.

### **The Contract of January 2nd, 1882.**

The arrangement between the companies, the Des Moines & St. Louis (predecessor of the Wabash), and the Des Moines Northwestern and St. Louis, Des Moines and Northern (predecessors of the Milwaukee), was expressed in a writing between these original companies and Col. How and General Dodge of date, January 2nd, 1882 (Rec., Vol. 2, p. 411).

It provided:

#### **“FIRST.**

The companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance, at their

joint expense for terminal facilities in the City of Des Moines to be held and used in common as hereinafter provided.

## SECOND.

In pursuance of said agreement, various purchases have been made of real property in the City of Des Moines in the name of James F. How, individually; James F. How, trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines and St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

## THIRD.

It is mutually agreed by the parties above named that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines and St. Louis Railway Company and one-quarter by each of the other two companies above named. It is understood that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

## FOURTH.

The title to said property shall be and remain in a trustee to be named by agreement of said companies, but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described.

## FIFTH.

The individual signers hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quit claim and convey the same to said trustee upon demand and reimbursement.

## SIXTH.

The Des Moines and St. Louis Company shall at all times be charged with the police control, supervision and maintenance of said property, and the expense thereof shall be apportioned between it and the said other two companies, the apportionment to be determined by the use thereof which they shall respectively make as evidenced by the wheelage; payment of the sum required to be made monthly to the Des Moines and St. Louis Railway Company, within ten days after rendition of an account stated.

## SEVENTH.

The control of said property by the Des Moines and St. Louis Railway Company shall not extend to a determination of the character and extent of improvements to be now or hereafter put upon the same, but differences between the parties under this head shall be settled by arbitration."

The remaining provisions of the contract need not be here considered.

It is obvious that under this contract the Railroad Companies were the absolute owners of this property with right to use it or dispose of it as they might agree among themselves, subject only to the right of Col. How and General Dodge to be reimbursed for what they had paid for lands purchased by them.

The contract does not provide, as stated on page 4 of the petition, that the property constituting its subject matter "should be held in perpetuity subject to the joint use and occupation of all said railway companies."

No trustee was ever named by the parties under paragraph four of the contract.

Operation under and according to the terms of this contract, each company doing its own switching over the tracks with simply police control, etc., by the Des Moines and St. Louis, proved to be unsatisfactory.

#### **Organization of the Des Moines Union Railway Company.**

December 10th, 1884, the Des Moines Union Railway Company was organized under the laws of Iowa relating to corporations for pecuniary profit. This was done at the instance of the railroad companies, parties to the agreement of January 2nd, 1882, and was contemplated by paragraph three of that agreement.

The agreement of January 2nd, 1882, is recited and set out in full in the Articles of Incorporation and then it is further recited (Vol. 2, p. 419):

"Whereas, each of said Railway Companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said companies, and

Whereas, it was provided in the contract aforesaid that a Depot Company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said

property in such manner as best to serve the interest of the parties hereto.

Now, therefore, for the purposes aforesaid, **as well as for those hereinafter expressed**, the undersigned hereby associate themselves in a body corporate, and adopt the following Articles of Incorporation."

The following among the articles of incorporation are pertinent to be considered:

## ARTICLE 2.

The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stock-yards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Ia., as well as the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, store-houses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by chapter 1 of Title IX of the Code, and the amendments thereto. All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise

dispose of the use of any part of its franchises to any other railway company—provided that the assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

### ARTICLE 3.

The capital stock of this corporation shall be one million (\$1,000,000.00) dollars, which shall be divided into shares of one hundred (\$100.00) dollars each and shall be paid in at such times and in such manner as the Board of Directors may determine, and the Board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge.

### ARTICLE 4.

The affairs of the Company shall be managed by a Board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of each year. The provisional Board of Directors, who shall hold office until the first Thursday in January, A. D. 1886; shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnells, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company,

and no stockholders shall be eligible for membership of the Board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.

The provisions herein with respect to nomination for the Board of Directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the Board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, The Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the Board of Directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the Stockholders as hereinbefore provided.

The Directors shall elect, from their number, a President, Vice-President, Secretary and Treasurer. All vacancies arising from the death or resignation of a member of the Board shall be filled by the Board.

#### ARTICLE 9.

These Articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the



Company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the City of Des Moines, Iowa."

It is to be observed:

First: The business of the corporation was expanded greatly beyond what was to be done under the agreement, as it was "the construction, ownership and operation of a railway in, around and about the City of Des Moines" and all sorts of things and everything incident thereto.

Second: The corporation was organized for pecuniary profit.

Third: The Company could not lease or otherwise dispose of its franchises without the consent of the Railroad Companies.

Fourth: The stock of the Company was to be paid for by the property held under the agreement of January, 1882.

Fifth: The members of the Board of Directors were to be nominated, four by the Des Moines & St. Louis Co. and two by each of the other Railroad Companies.

Sixth: No contract, lease or other agreement amounting to a permanent charge upon the property of the corporation could be made by it without approval of the Railroad Companies.

Seventh: These Articles could be amended only by a

vote of more than three-fourths of the shareholders and by such vote could be amended.

None of these provisions of the Articles of Incorporation limited or impaired in any way the title to the property which was to be and later was conveyed to the Terminal Company. The railroad companies and Col. How and General Dodge had an absolute title to the property and they conveyed all the title and all the interest they had to the Terminal Company.

The restrictive provisions of the Articles of Incorporation simply determined the mode in which and the limitations under which the powers of the Terminal Company were to be exercised.

### **Resolutions for Transfer of Property to Des Moines Union Railway Company.**

On January 1st, 1885, at a meeting of the shareholders of the St. Louis, Des Moines & Northern Co. the following resolution providing for the conveyance and transfer of all its right and interest in the terminal property at Des Moines to the Des Moines Union Railway Company was unanimously passed (Vol. II, p. 423):

"Whereas, The Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines and Northern Railway Company, G. M. Dodge, James F. How and James F. How, Trustee, on the 2nd day of January, A. D. 1882, entered into a contract whereby it was agreed to purchase, hold, control and use certain real estate and franchises in the City of Des Moines, which had theretofore been held and used by certain of the individual parties thereto, for certain purposes and upon certain conditions set out in said contract; and

Whereas, On the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated, and provided in the aforesaid contract to acquire, hold, use and enjoy the real estate property, rights and franchises in the City of Des Moines, east of Farnham Street in said city of the aforesaid railway companies and signatories of said contract acquired or held thereunder and to carry out the purposes of the said contract of January 2nd, 1882.

Now, Therefore:

1. Resolved, That this Company accepts and ratifies, so far as its interests are affected thereby, the Articles of Incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of the said contract of January 2, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company.

2. Resolved, That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract to convey, assign and transfer to said Company all its rights, title and interest of whatever name and character, in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said city, now held, enjoyed or claimed by either or all of the signatories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired or held in pursuance of said contract."

At the same meeting the following resolution pro-

viding for the transfer of the management and operation of the property was passed (Vol. IV, p. 1474):

“Resolved, That the proper officers of the Company be authorized to transfer the management and operation of its property in Des Moines so far as the same may now be vested in the Company on the first day of January or as soon thereafter as practicable, leaving the question of settlement between this Company and the Des Moines Union Railway Company as authorized under the resolution for that purpose heretofore this day adopted to be arranged as directed therein.”

On the same day like resolutions were passed at the shareholders' meeting of the two other Railway Companies.

It is to be observed that by these resolutions the Railroad Companies intended three things—first, a ratification of the incorporation of the Des Moines Union Company, which involved approval of the ownership of the terminal property by that Company; second, a sale of the terminal property to the Des Moines Union Company in consideration of its stocks and bonds, and, third, the immediate transfer of the control, management and operation of the property to the Des Moines Union, leaving the settlement of the amount of stocks and bonds to be paid for the property to be determined thereafter.

On the same day at a meeting of the Directors of the Des Moines Union Company the following resolutions were adopted (Vol. II, p. 433):

“Resolved,

#### FIRST.

That this Company accepts the transfer and management and operation of said property in

the City of Des Moines, east of Farnham Street in said city, heretofore owned and controlled by the Des Moines & St. Louis Railroad, Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, and the several others, parties to said contract, and assumes control thereof from this date, so far as practicable, and it hereby instructs its President to make such order as may be necessary to render such control and management effective, as provided in said contract.

### SECOND.

That the President, Vice-President, Secretary and Treasurer of this Company be, and they are hereby, appointed a committee to confer with the several parties to said contract and agree with them severally upon the terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this Company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this Company with the title, control and management of said properties provided for in said contract of January 2nd, 1882.

### THIRD.

That to enable this Company to pay for the property and to maintain, operate and improve the same, and purchase other property necessary to carry out its objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same, the President and Secretary of this Company are hereby authorized and directed to issue full-paid capital stock of this Company not to exceed one million (\$1,000,000.00) dollars and not to exceed five hundred (500) bonds of this Company, of the denomination of one thousand dollars (\$1,000.00); the form to be agreed upon hereafter by this Board.

And to secure said bonds, the President and Secretary are authorized and directed to execute, in the name of this Company, a first mortgage or deed of trust, conveying all of said property so to be conveyed to this Company or thereafter to be acquired, to a trustee therein named, the form of which deed of trust shall be hereafter determined by this Board.

And when said committee shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this Company necessary to be delivered to them, and each of them, in payment for said railroad property and franchises, the President and Secretary of this Company shall deliver the same to said several parties as each appear to be entitled, on receipt of the conveyances and assignments of said property so to be made to this Company."

Here, then, was the assent of the Des Moines Union to purchase this property with its stocks and bonds and at once to take over its control, operation and management.

### **The Terminal Mortgage.**

But financial difficulties intervened. The railroad enterprises were not prosperous and nothing was done in the way of carrying out these resolutions until some time in 1887, when a mortgage by the Des Moines Union of all its property was prepared by Col. Blodgett, the General Counsel of the Wabash and of the Des Moines and St. Louis. The mortgage is dated November 1st, 1887, but was acknowledged February 28th, 1888, and recorded May 21st, 1888 (Vol II, p. 459).

The mortgage recites that the Des Moines Union is

"fully authorized to locate, construct, **own** and operate a railway in, around and about the City of Des Moines" and that it "has undertaken and partially completed the construction of a railroad in the City of Des Moines," and that it "has purchased, acquired and owns by condemnation and otherwise, valuable real estate in said city, and valuable franchises from the City Counsel of said city" (Vol. II, p. 460), and

"Whereas, For the purpose of paying for the property aforesaid, aiding in the construction and extension of said railway, perfecting the title to said property, and completing all necessary and desirable improvements thereto and thereon, said party of the first part proposes to issue its bonds to the amount of eight hundred thousand (\$800,000) dollars, to be dated on the first day of November, 1887, in accordance with the resolutions and orders of its Board of Directors at a duly called and authorized meeting thereof."

The mortgage described the property covered by it by detailed descriptions which include all the property that was ever within the scope of the agreement of 1882 and then to leave no doubt contains this paragraph (Vol. II, p. 464):

"Also all the property and realty embraced in the several conveyances made to the said Des Moines Union Railway Company by James F. How, Trustee, James F. How, Grenville M. Dodge, the Des Moines Northwestern Railway Company, the Des Moines and St. Louis Railway Company, and the St. Louis, Des Moines & Northern Railway Company, or any other person or corporation not specially named above, and for which conveyances reference is hereby prayed to the records of said Polk County, Iowa."

The mortgage was in the general form usual at that time.

While this mortgage was in the course of preparation, the Railroad Companies and the Terminal Company were engaged in carrying out the purposes of the resolutions of 1885.

### **Resolutions for Conveyance by How and Dodge.**

Those resolutions, through inadvertence, perhaps, contained no direction to the Trustees, Col. How and General Dodge to make conveyance of the property held by them, and this omission was now supplied.

November 5th, 1887, the Board of Directors of the St. Louis, Des Moines and Northern passed the following resolutions (Vol. II, p. 435):

“Whereas, James F. How has prior to 1881 and since then purchased certain property and made expenditures on same as Trustee for this Company, the money expended for said property being furnished by the Wabash, St. Louis & Pacific Railway Company, and

Whereas, Under an agreement between the Company and the Wabash, St. Louis & Pacific Railway Company and others it was intended that said property, standing in the name of James F. How, Trustee, should be transferred to the Des Moines Union Railway Company under certain conditions, it is hereby

Resolved, That James F. How is requested by this Company to transfer to the Des Moines Union Railway Company the property referred to above, so purchased on receiving from said Company a stipulation that as soon as practicable after the transfer said Union Railway Company is to deliver to him first mortgage bonds of that Company to the amount of the money advanced for the pay-



ment of said property and improvements, with interest on same and taxes paid thereon and also three-fourths of the stock of the Des Moines Union Railway Company, said bonds and stock to be transferred by said How to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company or their successors or assigns in lieu for the money advanced by said Company to make the purchase of the above property and improvements and the payment of taxes for this Company.

Whereas, Grenville M. Dodge has prior to 1881 and since then purchased certain property and made expenditures on the same as Trustee for this Company, the money expended for said property being furnished by the said Dodge, and

Whereas, Under an agreement between this Company and the Wabash, St. Louis & Pacific Railway Company and others it was intended that said property standing in the name of Grenville M. Dodge, Trustee, and Grenville M. Dodge, individually, should be transferred to the Des Moines Union Railway Company under certain conditions, it is hereby

Resolved, That Grenville M. Dodge is requested by this Company to transfer to the Des Moines Union Railway Company the property referred to above so purchased on receiving from said Company a stipulation that as soon as practicable said Union Railway Company is to deliver to him first mortgage bonds of that Company to the amount of the money advanced by him for the payment of said property and improvements, with interest and taxes on the same, and also one-fourth of the capital stock of the Des Moines Union Railway Company."

Similar resolutions were passed by the two other Railroad Companies on November 8th (Vol II, p. 437 and 442).

### **Assent by the Terminal Company.**

And on November 8th the Terminal Company passed resolutions assenting to the proposals of the Railroad Companies (Vol. IV, p. 1299) and authorizing the delivery of its stocks and bonds in payment of the property conveyed to it.

### **The Deeds of Conveyance.**

Conveyances were now made by the Trustees, Col. How and General Dodge, of the land standing in their names (Vol. II, pp. 446 to 453).

Under date of November 7th, 1887, the St. Louis, Des Moines and Northern made a deed to the Des Moines Union of the property standing in its name, which, after describing the property conveyed, reads as follows (Vol. II, p. 456):

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part and assigns forever."

There could hardly be left in the grantor after all this, the entire beneficial interest in the property.

Under date of February 21st, 1888, the Des Moines and St. Louis Company executed a deed which, after specifically describing a number of parcels of real estate conveyed by the deed, proceeds (Vol. II, p. 458):

"And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor, together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, sidetracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchises and rights it may have acquired by grant, donation, purchase or otherwise and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance "Granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said city between Court Avenue and Vine Streets. And the said Des Moines and St. Louis Railroad Company hereby covenants to warrant and defend the said premises against all the lawful claims of all persons whomsoever, claiming by, through or under it."

The contention is made in the face of this warranty deed that the grantor reserved to itself and to the two other Railroad Companies the entire beneficial interest in all the property conveyed.

The bonds of the Terminal Company were delivered to the Railroad Companies, and by them were sold

upon the general market. It is conceded by petitioners that the bonds were a lien upon the property of the Terminal Company, but it is contended that the stock represents no sort of beneficial interest in that property.

Actual possession of the property was taken by the Terminal Company May 1st, 1888, and ever since then that Company has held possession of and has operated the property.

### **The Operating Contract of 1889.**

Under date of May 10th, 1889, a contract was made between the Terminal Company and the three Railroad Companies, effective from May 1st, 1888, and to run for thirty years from that time, providing for the use and operation of the property by the Terminal Company.

This contract was prepared by the General Counsel of the predecessor of the Wabash Company.

The preliminary recitals of this contract are as follows (Vol. II, p. 479):

“This agreement, made and entered into this 10th day of May, A. D. 1889, by and between the Des Moines Union Railway Company, of Des Moines, Iowa, party of the first part, and the Des Moines & St. Louis Railroad Company, the Des Moines & Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, parties of the second part, witnesseth that:

Whereas, The said party of the first part is the owner of valuable terminal facilities in the City of Des Moines, Iowa, hereinafter described; and

Whereas, The respective parties of the second part have railroads in the State of Iowa which

terminate at, or run into and through, said City of Des Moines, and in order to prevent unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties should have the use of the terminal facilities of said first party; and

Whereas, Said party of the first part has become incorporated and organized under the laws of the State of Iowa for the purpose of owning and operating a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said city to Farnham street, in western part thereof; and

Whereas, Said party of the first part, in pursuance of said charter, has acquired and now owns a railway in said city, as above set forth, and has already acquired or constructed a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, round houses, freight houses and other terminal facilities, and intends to acquire and construct more; and

Whereas, Said second parties are each desirous of having the right to use said terminals in connection with their respective railroads; and

Whereas, For the protection of the parties hereto and their assigns, it is important that the rights, duties and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined.

Now, therefore, in consideration of the premises, it is mutually agreed by and between said party of the first part and each of the several parties of the second part (each of said second parties contracting for itself), as follows:"

The contract then provides for the acquisition of

more property and the construction of more facilities by the Terminal Company, as follows (Vol. II, p. 480):

**Section One.** The party of the first part agrees to proceed with reasonable dispatch, and whenever its Board of Directors shall deem it expedient, to erect and furnish for the use of the parties of the second part, in said City of Des Moines, a union passenger depot, and such additional switches, sidings, freight depots, round houses, shops, water tanks and yard appurtenances, as the Board of Directors of said first party may consider reasonable, and for those purposes said first party shall acquire by lease, purchase, or otherwise, such additional real estate as may be necessary.

**Section Two.** The amount of such additional grounds, and the form, character and cost of said union depot and other structures and appurtenances to be erected and furnished by said party of the first part, as well as the management, operation, improvement and repairs thereof, shall in all matters not otherwise specifically provided for herein, be determined by the Board of Directors of said first party."

Other sections of the contract prescribe details of the service to be rendered and the charges therefor.

There are sections dealing with the transfer of stock in the Terminal Company to be considered later.

This contract was observed by the parties and their successors until the close of its term.

#### **Amendment of Articles of Incorporation of the Des Moines Union Railway Company.**

The petition for certiorari, p. 6, states that:

"He (F. M. Hubbell) caused the records of the Des Moines Company (the Terminal) without

**knowledge or consent of the railway companies to purport to show** that at a meeting of its stockholders, when in fact no stock had been issued or subscribed, its articles of incorporation had been amended so as to eliminate all the rights and interests of the railway companies in their joint railroads and terminal facilities and create a colorable claim that the Des Moines Company had acquired them, etc."

This is a charge, certainly a suggestion, that the amendments to the articles of incorporation were furtively made by Mr. Hubbell.

A recital of what was done, with references to the record, will show that nothing was done without the presence of all parties in interest and participation by them.

It is true that at this time no certificates of shares had been printed and issued to the parties entitled, but the authorized amount of capital stock had been determined, its issuance in payment of property received had been directed and the amount due to each of the railroad companies had been settled.

The integrity of the records of these various corporations is not impeached, and there is nothing in the testimony to contravene any recital of facts in them.

At the annual meeting of the stockholders of the Terminal Company held January 3rd, 1890, among other things done, a Board of Directors for the ensuing year was elected. General G. M. Dodge presided at the meeting.

J. F. How, on behalf of the Wabash Railroad Co., operating the Des Moines and St. Louis R. R. Co., nominated Jas. F. How, C. M. Hays, W. H. Blodgett and A. B. Cummins "to be voted for as directors of

of the Des Moines Union Railway Company to represent the said Wabash Railroad Company, it having been certified to this meeting by the secretary of the Wabash Railroad Company and Des Moines and St. Louis Railroad Company that the above named gentlemen had been duly nominated as candidates for directors in this company on behalf of the Wabash Railroad Company, and the Des Moines and St. Louis Railroad Company" (Vol. IV, p. 1306).

Col. Jas. F. How was a vice-president of the Wabash Company and C. M. Hays was its general manager.

The same record shows that General Dodge, on behalf of the Des Moines and Northern nominated himself and L. M. Martin as directors of the Terminal, and F. M. Hubbell, on behalf of the Des Moines and Northwestern, nominated himself and F. C. Hubbell to represent his company.

The men nominated were all elected. Here was an annual meeting, of which every stockholder had constructive notice, and which was attended in the only way in which corporations can attend, that is, by personal representatives, by every stockholder in the company, and those representatives were on behalf of the Wabash, Col. J. F. How and Chas M. Hays; on behalf of the Des Moines and Northern, General G. M. Dodge and L. M. Martin, and on behalf of the Des Moines & Northwestern, F. M. Hubbell and F. C. Hubbell.

Further proceedings were had at this meeting as follows (Vol. II, p. 1307):

"James F. How moved that the question of amending the articles of incorporation of this Company, as well as the question concerning issuing of stock for the purchase price of the



terminal property be referred to Attorneys W. H. Blodgett and A. B. Cummins for their investigation and recommendation."

Thus, what the petition for certiorari says was done by F. M. Hubbell "without knowledge or consent of the railway companies" was initiated at a meeting presided over by Gen. Dodge of the Des Moines and Northern, being moved by Col. How of the Wabash and referred for investigation and recommendation to Col. Blodgett and Hon. A. B. Cummins, both representing the Wabash.

This meeting adjourned without action on the amendments to February 18th. Meanwhile the attorneys were busy. Mr. Cummins prepared the amendments and sent them to Col. Blodgett for review (Vol IV, p. 1598).

At the February meeting, there being present A. B. Cummins, representing the Wabash, L. M. Martin for the Des Moines and Northern and F. M. and F. C. Hubbell of the Des Moines and Northwestern, the proceedings had were as follows (Vol. IV, p. 1311):

"The secretary reported that notice of the meeting had been duly published and also reported that he had, pursuant to the articles of incorporation, notified each stockholder of the time, place and object of this meeting, which notice contained the amendments proposed to be offered to the articles of incorporation.

Upon motion of A. B. Cummins the report of the secretary was adopted and this meeting declared to be duly and legally called, for the purpose of considering and adopting or rejecting amendments to the articles of incorporation.

Thereupon A. B. Cummins presented certain amendments to the articles of incorporation.

Thereupon F. M. Hubbell moved that the meeting of stockholders do now adjourn for the purpose of having further opportunity to examine said amendments, to meet on Tuesday, the 8th day of April, 1890, at ten o'clock a. m., which motion being seconded, was unanimously carried and thereupon the meeting of stockholders adjourned to meet as aforesaid."

At the meeting on April 8th there were present three men who had been elected as Wabash directors of the Terminal Company, viz., J. F. How, C. M. Hays and A. B. Cummins; one a director representing the Des Moines and Northern, viz., L. M. Martin, and the Hubbells, F. M. and F. C., representing the Des Moines and Northwestern.

The record, Vol. II, p. 488, *et seq.*, shows that the amendments to the articles of incorporation were offered one by one, the different individuals present each taking a hand, and all were unanimously adopted.

Under the law of Iowa, it was necessary for the officers of the Des Moines Union Company to certify the adoption of these articles of amendment and formally to acknowledge the certificate.

This was done by F. M. Hubbell, F. C. Hubbell, L. M. Martin, A. B. Cummins and Horace Seeley on April 10th, 1890; by James F. How, Charles M. Hays and Wells H. Blodgett on April 14th, 1890; by G. M. Dodge, April 16th, 1890, and by H. D. Thompson, April 21st, 1890 (Vol. IV, pp. 1604-1610).

The articles as thus amended and certified were filed for record with the local recorder on April 23rd, 1890, and with the Secretary of State on May 12th.

And then notice of these amendments under signature of General Dodge as president of the company,

attested by F. M. Hubbell as secretary, was published in the Des Moines Leader for four consecutive weeks, from April 23rd to May 20th, 1890.

And under these amended articles and in accordance with them all parties concerned voted their stock, elected directors and did business generally without complaint for seventeen years, or until about the time of the institution of this suit.

These amendments were made in light and leisure, not in haste and darkness as charged in the petition.

And so Mr. Hubbell did not cause the records of the Terminal Company "without knowledge or consent of the railway companies to show" that the articles of incorporation were amended, but all concerned, the representatives of all the railroad companies, and particularly the Wabash, believed that amendments were necessary and acting with great deliberation, after successive adjournments and always under the advice of competent counsel, made, published, declared and accepted those amendments.

### **Issuance of the Capital Stock of the Terminal Company.**

The petition (p. 6) states that F. M. Hubbell caused 4,000 shares of the stock of the Terminal Company "to be issued under Article III of the alleged amended articles, which falsely stated the stock would be issued in payment for the property, bonds having been previously issued for that purpose. The stock was therefore issued without consideration."

This is distinctly misleading in its suggestion. What was done respecting the stock of the Terminal Company, from beginning to end was with the knowledge,

approval and active participation of each and every one of the railroad companies, the original ones and their successors and assigns.

Article III of the original articles of incorporation of the Terminal Company (Vol II, p. 420), provided that the capital stock of the corporation should be one million dollars and the board of directors was authorized to receive in payment therefor the Des Moines properties and franchises of the three railroad companies.

These properties and franchises had been acquired from time to time since 1880. When they incorporated the Terminal and took over the property, they gave bonds to the parties who had advanced money for the property in amounts equal to the money advanced and as further consideration for the property acquired distributed the stock one-half to the Des Moines and St. Louis and one-fourth to each of the other companies (Vol. II, pp. 423, 435, 436, 437, 438, 442).

In November, 1887, the articles of the Terminal Company were amended increasing the capital stock to two million dollars (Vol. IV, p. 1298).

The contract of May 10th, 1889, precedes by nearly a year the amendments to the articles of the Terminal Company made in 1890. This contract recites, section 26, that the Des Moines and St. Louis Company is entitled to one-half of the capital stock of the Terminal Company, and the two other companies each to one-fourth. It further recites that "no certificates for said shares have yet been issued to said parties," and then proceeds to say that certificates shall be issued for ten thousand shares, par value one hundred dollars each, to the Des Moines and St. Louis and for

five thousand shares to each of the other railway companies (Vol. II, pp. 486 and 487).

But no stock certificates were in fact printed and issued to the railway companies at this time. They proceeded in the view, however, until in 1890 they amended the articles of incorporation, that they held stock in the Terminal Company in the amount and proportion stated in the agreement of May 10th, 1889.

There was no doubt some water in this stock, but of this the petitioners cannot complain, for they or their predecessors did the watering.

Mr. Cummins set about to correct this evil by an amendment to the third article of incorporation of the Terminal Company, which provided, among other things (Vol. II, p. 490):

“The capital stock of the corporation shall be two million dollars (\$2,000,000), which shall be divided into shares of one hundred dollars each; said shares shall be paid for and issued in the manner following and not otherwise; four thousand shares as a part of the purchase price of the Terminal property originally acquired by the corporation, it being now agreed by all the stockholders that said sum of four hundred thousand dollars, together with the first mortgage bonds theretofore issued for that purpose constituting the fair value of said property when so acquired; and all resolutions and proceedings of the corporation heretofore had with respect to the amount of capital stock to be issued as such purchase price, are set aside and held for naught.

Said four thousand shares of the capital stock shall be issued to the following corporations and in the following proportions:

Two thousand shares to the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, successor in ownership to the Des

Moines and St. Louis Railroad Company, and the present owner of the property known as the Des Moines and St. Louis Railroad.

One thousand shares to the Des Moines and Northwestern Railway Company, successor to the Des Moines Northwestern Railway Company, and

One thousand shares to the Des Moines and Northern Railway Company, successor to the St. Louis, Des Moines and Northern Railway Company, and the said shares are hereby declared to be fully paid by the transfer of the aforesaid property. The remaining capital stock, to-wit, sixteen thousand shares, or any part thereof, shall be issued only by the authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all the stock theretofore issued, and shall be fully paid either in money or property at its fair market value, before certificates therefor shall be executed and delivered."

At this same meeting of the Terminal Company Mr Cummins introduced a resolution which explained and was intended to explain the action of the meeting with respect to the capital stock. The resolution recited that by inadvertence there was some uncertainty in the records of the Company as to the price at which the property had been acquired, and all parties being agreed that the property and franchises incident thereto should be purchased at its fair value payable partly in bonds and partly in stock fully paid and it being agreed that the property was fairly worth the sum of \$861,257.11, and the relative shares of this to which the parties respectively were entitled having been ascertained and having been adjusted and paid so far as payable in bonds, it was resolved unanimously (Vol. II, p. 496):

"1st. That the purchase price of the property

originally acquired by the Company, as above stated, be fixed at said sum eight hundred sixty-one thousand two hundred fifty seven and  $21/100$  (\$861,257.21) dollars as of the date of the conveyance thereof.

2nd. That the payment of a portion of such purchase price in first mortgage bonds, as above set forth, be confirmed and approved.

3rd. That to complete the payment of such purchase price, the president and secretary are hereby authorized to issue certificates for thirty-nine hundred and ninety-two (3,992) shares of stock, which shares, including eight already issued on behalf of said parties, aggregate four thousand (4,000) shares, as follows:

To the purchasing committee of the Wabash, St. Louis and Pacific Railway Company, nineteen hundred and ninety-six (1,996) shares.

To the Des Moines and Northern Railway Company nine hundred and ninety-eight (998) shares, and to the Des Moines and Northwestern Railway Company nine hundred and ninety-eight (998) shares.

4th. That the proceedings heretofore had respecting the issuance of capital stock, so far as such proceedings are inconsistent with said amendments to the articles of incorporation or with this resolution, are hereby modified to conform hereto."

Certificates of shares were now issued as provided in this resolution to the several parties on the 8th day of April, 1890 (Vol. II, p. 711).

#### **Acquisition of Terminal Stock by F. M. Hubbell & Son.**

The petition states that (p. 6):

"by mesne assignments F. M. Hubbell and his son, F. C. Hubbell, acquired individually five-

eighths thereof, or 2,500 shares, from the company they dominated in a trade at the alleged price of ten cents on the dollar, in violation of the agreement that the stock would be sold "only to a railroad company who would join with the Wabash in making a contract with the Des Moines Company, guaranteeing interest upon the bonds, operating expenses, etc."

There was no such agreement as that stated between any of the parties, nor has the inference that F. M. Hubbell & Son acted in bad faith, in acquiring their stock any foundation in the testimony.

The original articles of incorporation contained no restriction on eligibility to ownership of stock. They did impose as a qualification for the directorship that the person must be nominated by one of the three railroad companies and they did restrict the company itself as to the disposition or burdening of the property. The parties evidently thought that individuals might become shareholders (Vol. II, p. 420-421).

The agreement of May 10th, 1889, in Section 26, did contain a restriction on the transfer of Terminal stock viz.: "all of said certificates (of shares) shall express upon their face that they are not transferable in whole or in part without the consent in writing of all the parties of the second part to this agreement (the three railroad companies) except that any shares of stock" issued to qualify some one as a director may be re-transferred, etc., etc. (Vol. II, p. 487).

The three railroad companies consenting, anybody could acquire stock in the Terminal Company.

The articles of incorporation as amended in April, 1890, provided in Article 3 that the stock was transferable only on the books of the Company by and with



the consent of three-fourths of all the directors, except in case of a transferee who is or becomes the owner of one of the three lines of railroad involved and a director could not be elected except by vote of more than seven-eighths of the stockholders (Vol. II, p. 491).

Here again individuals are not disqualified, but the power of rejection is reserved to one-eighth of the shareholders.

On February 5th, 1890, Mr. O. D. Ashley, who was secretary of the Purchasing Committee of the old Wabash Company and president of the Company itself, which owned all the stock and bonds of the Des Moines and St. Louis Company, wrote F. M. Hubbell, saying (Vol. IV, p. 1599):

"I will give you for the Purchasing Committee the option of buying of them \$135,000 of the bonds of the Des Moines Union Railway Company, and one-fourth interest in the capital stock of that company for \$135,000 and accrued interest from November 1st, 1889, any time within ten days from this date. Payment to be made in cash if the option is availed of by you. (Signed) O. D. Ashley, Sec'y Pur. Com."

General Dodge came into this transaction for one half of it, leaving Mr. Hubbell with the remaining half as to which the Purchasing Committee solemnly authorized and empowered "said Des Moines Union Railway Company, or the proper officers thereof, to issue to said Hubbell or his assigns, one-eighth of all the capital stock in the said Des Moines Union Railway Company" and further, "The said Purchasing Committee hereby guarantees the approval by the Des Moines and St. Louis Railroad Company of the

transfer of said stock to said Hubbell within sixty days" (Vol. IV, p. 1601).

This sale to Hubbell was reported in writing to the Purchasing Committee and on motion of General Hubbard was approved (Vol. IV, p. 1558).

April 8th, 1890, this sale of stock was approved by the directors of the Des Moines and St. Louis Company, they being James F. How, C. M. Hays, H. S. Priest, George S. Grover, F. M. Hubbell and A. B. Cummins, all save Mr. Hubbell being Wabash representatives (Vol. II, p. 1434).

And the Des Moines Union Company itself on April 8th, by vote of all its directors, ratified and approved the sale and ordered the transfer of the certificates both to F. M. Hubbell and to General Dodge (Vol. II, p. 1312).

Pursuant to these transactions a certificate for five hundred shares was on April 8th, 1890, issued to F. M. Hubbell and for a like number to General Dodge (Vol. 2, p. 711).

April 5th, 1890, Mr. Ashley as president of the Wabash Railroad Company wrote to Mr. F. M. Hubbell as follows, viz. (Vol. IV, p. 1602):

"I have yours of April 1st, this morning. The result of my conversation with Messrs. Joy and Welles is a rather vague idea that we ought not sell \$100,000 of the Des Moines Union Railway Terminal bonds and one-eighth interest in the capital stock at less than \$115,000 and accrued interest on the bonds, and I do not feel authorized to offer it at any less price. If, however, you will make me a definite bid of the best price you can, I will communicate it to the other members of the committee and give you an early and definite reply. It must be understood, of course,

that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the Company according to the understanding we had when you were here."

The negotiations opened by this letter resulted in a contract on June 5th, 1890, for the purchase by Hubbell of \$50,000 of bonds and 500 shares of the stock of the Des Moines Union Company for \$57,736. Transfer of the shares on the books of the Des Moines Union was guaranteed "so far as the vote of the directors of said Des Moines Union Railway Company, representing the Des Moines and St. Louis Railway Company will secure said transfer (Vol. IV, p. 1613).

The directors of the Des Moines and St. Louis Company, on February 11th, 1891, by unanimous vote approved the sale of the stock to Hubbell; Hays and How of the Wabash Company being present (Vol. IV, p. 1438).

The Des Moines Union on the same day approved the sale and made the transfer by unanimous vote of its directors (Vol. IV, p. 1320).

The foregoing are the contracts and agreements under which Mr. Hubbell first got the Terminal stock.

The petition (p. 5) assumes to quote from an agreement providing that this stock would be sold "only to a railway company who will join with the Wabash in making a contract with the Des Moines Union guaranteeing interest on the bonds, operating expenses, etc." No such words are to be found in any agreement between any of the parties; no such restriction on transfer of stock is contained in any of the articles of incorporation, original or amended.

More than a year and a half prior to the sale of the

stock to Hubbell he wrote to O. D. Ashley, president of the Wabash, saying that he had been asked whether Des Moines Union stock could be bought and at what price. In his answer, Ashley said the Purchasing Committee would be glad to sell a quarter interest at a fair price, but he said, "I have always supposed that it would be necessary to confine the sale to such railway companies as would be interested in the station." Hubbell in his reply said, "I agree with you that the sale of a quarter interest in the stock of the Terminal Company should be made only to a railway company who will join with the Wabash in making a contract with the Des Moines Union guaranteeing the interest upon the bonds and operating expenses, etc." He says that a certain Mr. Jones has been making inquiries about the shares, but he takes no stock in Jones (Vol. III, pp. 1059-1060). The last letter was written on June 18th, 1888. The subject of sale or purchase of stock by anyone in the Des Moines Union was not broached again until February 5th, 1890, when an entirely new and distinct chapter was opened by the option which Mr. Ashley gave to Mr. Hubbell.

The two transactions were distinct and unrelated, and they were eighteen months apart in time. Nothing was said in 1890 as to limiting sales of Terminal stock to certain railway companies. It is evident that Mr. Ashley, on behalf of the Wabash Company, wanted to market some Terminal stock and bonds. The transactions with General Dodge and F. M. Hubbell were sales of bonds and stocks pure and simple. And in making these sales the Purchasing Committee acted with full knowledge of the situation. Months passed by before the last sale was consummated by transfer of the stock. In truth, the money paid at the time was a

great desideratum, and the record shows that it was paid by Dodge and Hubbell to the Purchasing Committee and by that committee to the Wabash Company.

### **Relation of the Milwaukee Company to These Shares.**

The Milwaukee Company has acquired the two Northern lines and in connection with them one thousand shares of the stock of the Terminal. The original Northern Companies lost the properties by foreclosure. New companies were formed, which afterward were consolidated. In the course of these proceedings Hubbell and Dodge transferred their Terminal shares to the consolidated company, which then had 3,500 shares. The consolidated company did not fare well, and being in need of money, pledged 2,500 of its Terminal shares to F. M. Hubbell & Son. These shares were by agreement of the parties taken by F. M. Hubbell & Son in liquidation of some indebtedness. This was in 1893.

This Northern Company found itself very dependent upon the Milwaukee, and whether it would prosper or not was determinable by the division of rates it secured from the Milwaukee. To get a better division the Hubbells, who were largely interested in the securities of the Northern Company, both stocks and bonds, in the year 1894 gave a large block of the stock of the Northern Company, 16,800 shares, to the Milwaukee, together with an option to the Milwaukee to purchase 16,468 shares more at a low price and the exercise of this option would give the Milwaukee full control of the Northern Company (Vol. II, p. 838, and Vol. IV, p. 1618).

At the very beginning of the negotiations leading up

to these contracts which were executed in July, 1894, although dated March 15th, and indeed so early as February 22nd, 1894, Mr. Hubbell wrote to Mr. Miller, president of the Milwaukee Company, as follows:

"Your favor of the 20th is received and noted. Enclosed I send you a copy of the articles of consolidation and incorporation and trust mortgage of the Des Moines, Northern and Western Railway Company. There has been bonds issued on this property to the amount of \$2,770,000. I have no printed copy of the articles of incorporation of the Des Moines Union Railway Company, but will say they were drawn by our attorney, Mr. A. B. Cummins, and I think are all right, and if important to you, can have a copy made and sent you. The amount of bonds authorized by that corporation is \$800,000, bearing 5 per cent interest, of which amount \$612,000 have been issued. I enclose plat of Des Moines Union. We have about five miles of right-of-way occupied by about twenty miles of track. **The Des Moines Northern and Western Railway Company own one-fourth of the capital stock of the Des Moines Union Railway Company. The Wabash own one-eighth and five-eighths is owned by individuals.**

If you desire any further information, I shall be glad to furnish it" (Vol. IV, p. 1617).

Thus the Milwaukee was advised from the beginning and before it came into the situation of the precise facts as to this Terminal stock, viz.: one-eighth held by the Wabash, one-fourth by the Northern Company, which the Milwaukee contemplated getting and subsequently did get, and five-eighths by individuals.

The Wabash, of course, knew that individuals held Terminal stock, because it had sold it to them.

Year after year passed, with frequent directors' meetings and annual and perhaps other shareholders' meetings of the Terminal Company, and always the Wabash and the Milwaukee were represented and always the Hubbells were present and at the shareholders' meetings they voted and were recognized as having the right to vote the 2,500 shares of Terminal stock held by them, and shown to be held by them by the books of the Company.

### **The Ratification Agreement of 1897.**

More than this, in the year 1897 a revision of the contract of May 10th, 1889, was desired by the Wabash. For the present purpose it is not necessary to detail the negotiations which followed. There resulted a contract, dated July 31st, 1897, which in some measure is a revision, but more strictly a ratification of the old agreement (Vol. II, p. 506).

There seemed to be some doubt whether the railroad companies, then the Wabash and the Des Moines, Northern and Western, were bound by the old agreement and that was settled and the contract ratified and confirmed by the railroad companies in every respect with this exception, viz. (Vol. II, pp. 508-509):

“But it is expressly provided that so much of the said contract, a copy of which is hereto attached, as relates to the issuance and the distribution of the capital stock of the said Des Moines Company, is no longer binding, and that the capital stock of the said Des Moines Company is held as follows:

The Purchasing Committee of the Wabash, St. Louis and Pacific Railway Company, 500 shares.

The Des Moines Northern and Western Railroad Company, 1,000 shares.

F. M. Hubbell & Son, 2,500 shares.

Of the above shares belonging to said Purchasing Committee, two shares stand upon the books of the Company as follows: Joseph Ramsey, Jr., 1 share, and H. L. Magee, 1 share.

Of the shares belonging to the Des Moines Northern and Western, Railroad Company, two shares stand upon the books of the Company as follows: A. B. Cummins, 1 share, and F. M. Hubbell, 1 share.

Of the shares belonging to said F. M. Hubbell & son, five shares stand upon the books of the Company as follows: F. M. Hubbell, 1 share; F. C. Hubbell, 1 share; C. Huttenlocher, 1 share; H. D. Thompson, 1 share; A. N. Denman, 1 share."

And this contract of 1897 was formally ratified, approved and confirmed by the directors of the Wabash (Vol. IV, p. 1540); by the directors of the Des Moines, Northern and Western (Vol. IV, p. 1497), and by the directors of the Des Moines Union (Vol. IV, p. 1357).

### **Acquiescence.**

Nearly ten years passed after this without challenge of the rights of F. M. Hubbell & Son as shareholders. And during all the years they were giving their service in official relations to the development of the Terminal Company and its business, and they did this without pay, and that service constant and continuous, faithful and arduous, was accepted without question by these petitioners who now say the Hubbells have no beneficial interest whatever in the property they have served and managed so well.



### **In Conclusion.**

The case involves no profound questions of law.

The three railway companies, predecessors of the petitioners at the time of the contract of 1882, and under it, owned the property in question and every interest in that property.

The individual parties to that contract, Col. How and General Dodge, had no interest or right except to be reimbursed for what they had paid out, and they were so reimbursed.

As the railway companies made the agreement of 1882 so they could change it, and they did.

They created the Terminal Company, and they did this for the very purpose of having it acquire, own, operate and develop this property.

They transferred this property to the Terminal Company by conveyances as comprehensive in description of the rights and interests conveyed as the learning of experienced lawyers could devise.

They mortgaged this property, issued bonds secured by this mortgage, and sold those bonds to the public.

They issued stock against that same property and sold the stock.

The stock had for its basis the same property and the same interest in that property that underlaid the bonds.

The organization of the Terminal Company, the conveyance of the property to it, the contract of 1889, the amendments to the articles of incorporation in 1890, the sales of stocks and bonds, the ratification agreement of 1897, all were known to, participated in and approved by the persons who at the time were the ac-

credited representatives of these petitioners or their predecessors.

And there is not involved in this controversy anything of public interest or importance. The Terminal Company is discharging its public functions and duties and will continue to do so. Its property is affected with a public interest and is dedicated to the public use, and its obligations in this respect are the same whoever its shareholders may be or whatever may be their interest in the property. The controversy is essentially of a private nature. It is whether, notwithstanding the conveyance of the property in the most absolute terms and for a good consideration, the grantors reserved the entire beneficial interest in the property and the grantee got only a barren legal title. This affects the parties not as carriers, but as proprietors, for only proprietary rights are involved.

Respectfully submitted,

F. W. LEHMANN,  
J. L. PARRISH,  
Of Counsel for Respondents.